

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77—

1 460

NIAGARA MOHAWK POWER CORPORATION,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEW YORK—APPELLATE DIVISION—THIRD DEPARTMENT

JURISDICTIONAL STATEMENT

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April 12, 1978

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NIAGARA MOHAWK POWER CORPORATION,
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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
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JURISDICTIONAL STATEMENT

Niagara Mohawk Power Corporation ("Niagara Mohawk", "Appellant" or "the Company") appeals from a judgment and decision of the Supreme Court of the State of New York, Appellate Division—Third Department ("Appellate Division"), entered on September 12, 1977, upholding certain orders of the Public Service Commission of the State of New York ("the Commission"). Appellant submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal and should exercise its jurisdiction to determine the substantial questions presented.

Opinion Below

The opinion of the Appellate Division is reported at 59 App. Div. 2d 73, 397 N.Y.S.2d 210 (1977). The order of the Appellate Division, entered October 26, 1977, denying Niagara Mohawk's motion for reargument or, in the alternative, for leave to appeal to the New York State Court of Appeals ("Court of Appeals"), and the order of the Court of Appeals, entered January 17, 1978, denying Niagara Mohawk's motion for leave to appeal, are not reported. Copies of the Appellate Division's decision, the order of the Appellate Division and the order of the Court of Appeals are included in the Appendix at pp. 6a-10a, 2a-3a, and 1a respectively.

Jurisdiction

This appeal is brought to review a decision of the Appellate Division which confirmed orders of the Commission, dated November 16, 1976 and December 30, 1976, fixing rates of Niagara Mohawk for electric and gas service. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) to review a final judgment entered on September 12, 1977 by the Appellate Division. The Appellate Division is the highest court of the State of New York in which a decision could be had.* The validity of certain statutes of the State of New York (Commission orders issued November 16, 1976 and December 30, 1976)** was drawn

* The decision of the Appellate Division was a "final judgment" of the "highest court" of the State of New York in which a decision could be had and a "decision" in favor of the validity of the statutes drawn in question: *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 (1976); *Atchison, Topeka & Santa Fe Ry. v. Public Util. Comm'n*, 346 U.S. 346, 349 (1953); and *Napa Valley Electric Co. v. Railroad Comm'n*, 251 U.S. 366, 372-373 (1920).

**The Commission's orders are "statutes" within the purview of 28 U.S.C. §1257(2): *Atchison, Topeka & Santa Fe Ry. v. Public Util. Comm'n*, *supra* at 348; *Bluefield Water Works & Improvement Co., v. Public Serv. Comm'n*, 262 U.S. 679, 683 (1923); *Lake Erie & Western R.R. v. State Pub. Util. Comm'n*, 249 U.S. 422, 424 (1919); and *Grand Trunk Western Ry. v. Railroad Comm'n*, 221 U.S. 400, 403.

into question in the Appellate Division on the ground of their being repugnant to the Constitution of the United States. The decision of the Appellate Division entered on September 12, 1977 was in favor of the statutes' validity.

The instant appeal is timely taken. The 90-day period for docketing commenced on January 17, 1978 when Appellant's motion for leave to appeal was denied by the Court of Appeals. No appeal could be taken prior to that date because the judgment of the Appellate Division was susceptible of being reviewed and reversed until the Court of Appeals had acted. See *American Motorists Ins. Co. v. Starnes*, *supra* at 642; *Market Street Railway v. Railroad Commission*, 324 U.S. 548, 552 (1945); and *Andrews v. Virginia Ry.*, 248 U.S. 272, 275 (1919).

In the event that appeal is not considered the proper mode of review, Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

Questions Presented

I. Did the Commission's refusal to permit Niagara Mohawk to earn a return on that portion of its property consisting of tax refunds constitute confiscation and deprivation of property in violation of the Fifth and Fourteenth Amendments of the United States Constitution?

II. Was Niagara Mohawk denied due process of law when the Appellate Division explicitly rejected the sole basis for the Commission's action and confirmed the action on an alternative rationale not articulated by the Commission?

Statement

Niagara Mohawk is a privately owned public utility corporation serving customers in 37 counties of the State of New York with gas and electricity. The rates which Niag-

ara Mohawk charges its customers, and the terms and conditions of service affecting those customers, are regulated by the Public Service Commission of the State of New York under the provisions of the New York State Public Service Law and the Regulations of the Commission thereunder.

In 1974 and 1975 the Company received federal income tax refunds as the result of its retroactive adoption of minimum guideline lives for computing income tax depreciation in the years 1966-68. In an earlier proceeding, the Commission considered these income tax refunds and ordered the Company to flow them through directly to ratepayers. The Company challenged this order and its position was sustained on judicial review. *Niagara Mohawk Power Corp. v. Public Service Commission*, 54 App. Div. 2d 255, 388 N.Y.S.2d 157 (1976). The Appellate Division there held that the Commission's action constituted impermissible retroactive ratemaking and was without statutory authority. However, in concluding its opinion the Appellate Division, in dicta, invited the Commission to consider the refunds "when a future rate adjustment is requested." 54 App. Div. 2d at 257, 388 N.Y.S.2d at 159.

Six days after the Appellate Division's decision was issued, the Commission, in granting an increase in gas and electric rates, isolated for separate treatment the same income tax refunds and treated them as customer-contributed capital with a zero cost. The effect of this treatment was to deprive the Company of an opportunity to earn a return on its property by the amount of said refunds. The Commission further required the same treatment of certain real property tax refunds for the years 1971-74. The dollar impact of the Commission's action was to reduce the Company's rate base by more than \$13 million and its permissible annual revenues by approximately \$2.5 million. The only ground invoked by the Commission to support its determination was:

this money was originally paid by customers for an expense that the company ultimately did not incur.*

By petition dated March 14, 1977, Niagara Mohawk sought to annul the Commission's orders pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"). The basis for the petition was that the Commission's orders were "arbitrary, unsupported by substantial evidence, confiscatory, and contrary to the legal principle that future rates may not be determined on the basis of alleged past excesses." By order dated April 11, 1977, the proceeding was transferred to the Appellate Division from the Supreme Court, Albany County, pursuant to section 7804(g) of the CPLR.**

The Appellate Division confirmed the Commission's orders on August 4, 1977 but explicitly rejected the basis articulated by the Commission in support of its determination. The Appellate Division, in rejecting the Commission's conclusion that the tax refunds represented money paid by customers for an expense not incurred, stated:

The conclusion of the respondent [Commission] fails to recognize that the consumer never paid the expense in the first place.***

The Appellate Division confirmed the Commission's orders on the basis of a rationale that the Commission did not articulate or consider in any fashion; that is, that in some undesignated rate case in the past it was the express intention of certain unspecified parties that these tax refunds were to be an expense paid dollar for dollar

* *N.Y. Public Serv. Comm'n*, Opinion No. 76-23, November 16, 1976, p. 14.

** That section provides for transfer to the Appellate Division where an administrative determination is challenged, *inter alia*, on the ground that it is not supported by substantial evidence.

*** 59 App. Div. 2d at 74, 397 N.Y.S.2d at 211.

by the customers and, therefore, any excess of estimated over actual expense could properly be considered customer-contributed capital. There is no support for this substituted rationale either in fact or in ratemaking theory.

After issuance of the adverse decision the Company moved for reargument or, in the alternative, for leave to appeal to the Court of Appeals. That motion was denied and the Company then moved for leave to appeal to the Court of Appeals. That motion was also denied.

The Questions are Substantial

I.

The Commission's Order Depriving the Company of an Opportunity to Earn a Return on More Than \$13 Million of its Property is Confiscatory and Deprives the Company of its Property in Violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.

The issue presented in this case is not whether the return allowed a utility by a regulatory agency is so low as to constitute confiscation but whether the refusal to allow any return whatever on a substantial portion of the Company's property is confiscatory. As this Court stated in *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 690 (1923), the rule that

[r]ates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and . . . deprives the public utility company of its property in violation of the Fourteenth Amendment . . . is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary.

It follows that denial of the opportunity to earn *any* return is *per se* confiscatory.

In this case, decided November 16, 1976, the Commission labeled as customer-contributed capital some \$13 million of the Company's assets, subtracted that amount from rate base and thereby deprived the Company of about \$2.5 million in annual revenues. The amounts so treated were tax refunds received by the Company principally from the retroactive application of guideline lives to federal income taxes paid in the years 1966-68.

The sole reason advanced by the Commission to justify its labeling of these tax refunds as customer-contributed capital was that "this money was originally paid by customers for an expense that the company ultimately did not incur."* That is, when customers paid their bills in 1966-68 they purportedly paid more for the Company's income taxes than was warranted in the light of subsequent receipt by the Company of tax refunds.

The Commission's rationale is riddled with errors:

1. The Commission's basic position, that the Company's customers "paid . . . for an expense" is directly contrary to this Court's holding in *Board of Pub. Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23, 32 (1926), that

Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company.

The Appellate Division apparently agreed with this Court and rejected the Commission's sole rationale, stating that the "conclusion of the respondent [Commission] fails to recognize that the consumer never paid the expense in the first place."

2. The Commission's attempt to compensate the Company's customers in the future, for an alleged overpayment in the years 1966-68, is a classic example of retroactive

*Opinion 76-23, *supra* at 14.

ratemaking and violates the holding of this Court in *Board of Pub. Utility Commissioners v. New York Telephone Co.* that

[p]rofits of the past cannot be used to sustain confiscatory rates for the future. *Id.* at 32.

What the Commission, with the Appellate Division's approval, has done is to fix rates for the future based upon an alleged overestimate of a single item of expense [taxes] occurring some ten years ago. Since taxes are no different from any other expense, this case stands for the proposition that a regulatory agency may isolate any estimated expense and compare it with the expense ultimately incurred and, by labeling the difference "customer-contributed capital," reduce rates for the future as a means of compensating customers for an alleged overcharge.

3. Even if it were assumed *arguendo* that retroactive ratemaking is permissible and that future rates could be adjusted to offset past excesses, there is no evidence whatever that the Company at any time in the years in question earned an excessive return or that the Company's customers paid more than a just and reasonable rate. In fact, at no time for more than ten years has the Company earned even its allowed return.

II.

The Company's Right to Due Process of Law was Violated When the Appellate Division Confirmed the Commission's Rate Orders on the Basis of a Rationale Not Articulated by the Commission.

The Appellate Division denied Appellant due process of law when, after rejecting the sole rationale advanced by the Commission in support of its decision, it attempted to preserve the Commission's decision on a novel theory not

articulated by the Commission. In so doing, the Appellate Division violated this Court's holding that a reviewing court must judge agency action solely on the grounds invoked by the agency. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962); *FPC v. Texaco, Inc.*, 417 U.S. 380, 396-397 (1974).

As this Court stated in *SEC v. Chenery Corp.*, *supra* at 196:

If those [agency] grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Procedural due process requires the opportunity to challenge the evidence and the theory that purportedly support an agency determination. See *Goldberg v. Kelly*, 397 U.S. 254, 269-271 (1970). The Appellate Division's confirmation of the Commission's orders on an alternative rationale, not articulated by the Commission, deprived the Company of the constitutional guarantee of due process. The arguments advanced before the Appellate Division were and could only have been directed to the rationale upon which the Commission relied. The affirmance of the Commission's orders on a substituted rationale denied the Company the opportunity to demonstrate that the alternative rationale formulated by the Appellate Division was not supported by any evidence adduced in the proceeding before the Commission and was without any sound basis in regulatory practice. The instant case is a classic example of the judiciary, in an effort to avoid involvement with an area of administrative responsibility, transgressing the very policy to which it seeks to adhere, that is, not involving itself in an area clearly within the peculiar expertise of the

agency. The result is to "propel the court [judiciary] into the domain . . . set aside exclusively for the administrative agency." *SEC v. Chenery, supra* at 196. This Court should reaffirm the *Chenery* rule and clarify the role of the judiciary by reversing the decision of the Appellate Division.

Conclusion

The decision of the Appellate Division is, we believe, the only judicial statement in the State of New York concerning the proper ratemaking treatment of tax refunds and indeed may well be the only judicial holding on this subject in any jurisdiction.

As we have indicated, the decisions of the Commission and the Appellate Division are erroneous throughout: they are confiscatory, they are built upon the misconception that the customers pay for specific expenses, they mislabel tax refunds as customer-contributed capital, they constitute retroactive ratemaking and they have no support in the record or in legal precedent. In addition, the Appellate Division by substituting its own rationale for that of the Commission violated the rule set forth in *SEC v. Chenery*.

Unfortunately, the decisions below cannot be dismissed as merely wrongly decided cases without precedential value. Tax refunds are continuing phenomena involving substantial sums of money and the question of treatment of tax expense is an important part of every rate case. Clearly the only judicial holding on the subject will be of continuing and widespread importance.

While the treatment of tax refunds below constitutes an open invitation to confiscation—a matter of sufficiently broad concern to require consideration by this Court—the implications flowing from the decisions in this case are even more serious. If the correctness of expenses used in fixing past rates is to be subject to continuing re-examination in the light of subsequent developments, the rate

stability presently provided by the rule against retroactive ratemaking and by the filed rate doctrine will be destroyed and replaced by chaotic uncertainty. The matter is of great public importance and requires plenary consideration by this Court.

Respectfully submitted,

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Attorneys for Appellant,
NIAGARA MOHAWK POWER CORPORATION

April 12, 1978

APPENDIX

1a

STATE OF NEW YORK
COURT OF APPEALS

(Index No. 2724-77)

Mo. No. 1127

In the Matter of

NIAGARA MOHAWK POWER CORPORATION,
Appellant,

For a Judgment &c.

vs.

THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK,
Respondent.

Motion for leave to appeal denied with twenty dollars
costs and necessary reproduction disbursements.

DATED AND ENTERED: January 17, 1978.

STATE OF NEW YORK

At a Motion Term of the the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, on the 12th day of September, 1977:

Present: HON. LOUIS M. GREENBLOTT, *Justice Presiding*,
 HON. T. PAUL KANE,
 HON. ROBERT G. MAIN,
 HON. ANN T. MIKOLL,
 HON. J. CLARENCE HERLIHY, *Associate Justices*.

County Clerk's Index No. 2724-77

In the Matter of the Application of
 NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

For a Judgment Pursuant to Article 78
 of the Civil Practice Law and Rules,

against

THE PUBLIC SERVICE COMMISSION OF THE STATE OF
 NEW YORK,

Respondent.

A motion having been made by petitioner, Niagara Mohawk Power Corporation at this term of court in the above-entitled proceeding for an order granting reargument, or in the alternative, permission for leave to appeal to the Court of Appeals now, after reading and filing proof of due service of the notice of motion, the affidavit of Halcyon

G. Skinner, Esq., in support of the motion and respondent Public Service Commission having appeared in opposition thereto, and the Court having rendered a decision on the 14th day of October, 1977, it is hereby

ORDERED that, petitioner's motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals is denied, without costs.

ENTER:

/s/ JOHN J. O'BRIEN
 Clerk

DATED AND ENTERED: October 26, 1977

A TRUE COPY:

JOHN J. O'BRIEN
 Clerk

STATE OF NEW YORK

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department in the City of Albany, New York, commencing on the 20th day of June, 1977:

Present: Hon. LOUIS M. GREENBLOTT, *Justice Presiding*,
 Hon. T. PAUL KANE,
 Hon. ROBERT G. MAIN,
 Hon. ANN T. MIKOLL,
 Hon. J. CLARENCE HERLIHY, *Associate Justices*.

In the Matter of the Application of
 NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

against

THE PUBLIC SERVICE COMMISSION OF THE STATE OF
 NEW YORK,
Respondent.

The above-named petitioner having instituted this proceeding in Supreme Court, Albany County, pursuant to article 78 of the Civil Practice Law and Rules, to review determinations of respondent Public Service Commission, dated November 16, 1976 and December 30, 1976 and said proceeding having been transferred for disposition to the Appellate Division, Third Department, by order of the Supreme Court, Albany County, dated April 11, 1977 and entered in Albany County, and having been presented during the above-stated term of this court and having been

argued by Haleyon G. Skinner, attorney for petitioner, and Howard J. Read, attorney for respondent, and, after due deliberation the Court having rendered a decision on the 4th day of August, 1977 it is hereby

ORDERED that the determinations of respondent Public Service Commission of the State of New York, under review herein, be and the same hereby is confirmed, and the petition dismissed with costs.

ENTER:

/s/ JOHN J. O'BRIEN
 Clerk

DATED AND ENTERED: September 12, 1977.

A TRUE COPY:

JOHN J. O'BRIEN
 Clerk

STATE OF NEW YORK

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department in the City of Albany, New York, the following opinion, per Herlihy, J., was rendered on August 4, 1977:

SUPREME COURT

STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

In the Matter of NIAGARA MOHAWK

*Petitioner,**against*

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

Argued, June 21, 1977.

Before: HON. LOUIS M. GREENBLOTT, *Justice Presiding*,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
HON. J. CLARENCE HERLIHY, *Associate Justices.*

PROCEEDING pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Third Judicial Department by order of the Supreme Court at Special Term, entered in Albany County) to review determinations by respondent dated November 16, 1974 and

December 30, 1974 which excluded certain tax refunds from petitioner's rate base when calculating consumer rates for electric and gas service.

LAUMAN MARTIN (Haley G. Skinner of Le Boeuf, Lamb, Leiby & MacRae, 140 Broadway, New York, New York 10005, of counsel), for petitioner, 300 Erie Boulevard West, Syracuse, New York 13202.

PETER H. SCHIFF, for respondent, Public Service Commission, Empire State Plaza, Albany, New York 12223.

 OPINION FOR CONFIRMANCE

HERLIHY, J.

In rate proceedings commenced in 1974 the respondent authorized an annual rate increase, but in so doing it noted that the petitioner would be receiving Federal tax refunds by utilizing a retroactive application of depreciation standards for the years 1966-1969. The petitioner did receive a refund of about \$16.4 million and upon notification, the respondent ordered the petitioner to "flow through" a major portion thereof to its customers. That order was reviewed in an article 78 proceeding and a judgment of Special Term annulling the order was affirmed by this court upon the theory that the respondent was exceeding its powers by attempting to fix rates retrospectively instead of prospectively (*Matter of Niagara Mohawk Power Corp. v. Public Serv. Comm. of State of N.Y.*, 54 A D 2d 255). In considering the prior attempt to order a "flow through" or retroactive rate adjustment, this court observed that "the proper approach for the Commission is to consider this acquired money when a future rate adjustment is

requested. Such a procedure would fully protect the ratepayer from any unjust and unreasonable rates" (*id.* at 257).

In one of the orders now at issue herein, the respondent has considered the above-mentioned Federal tax refund received by the petitioner in the context of a new rate case initiated by proposed rate increases filed by the petitioner on December 19, 1975. In that order the respondent concluded that the windfall refund was in the nature of a contribution to capital by the customers of petitioner since it was a payment made upon rates which envisioned an expense which was not incurred or paid. As a result of its classification as capital contributed by customers, the petitioner cannot claim such money as an investment upon which it is entitled to receive a return (income) via future rates.

Considering the fact that rates approved by the respondent as an agent of the State are intended to permit the continuation of a monopolistic service, the question of what actually constitutes assets eligible for a profit or fair return on investment requires a form of expertise that is generally the precise area with which the respondent is entrusted. The balancing of the interests of the State and private enterprise is not a matter which may be exercised *de novo* by this court. Accordingly, the appropriate test to be applied in reviewing the singular determination of the respondent that the recovery of sums representing expenses which were previously included in a rate as expenses represent customer contributed capital, is whether or not it has a "sound basis in reason" giving due consideration to the facts. (See *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N Y 2d 222, 231.)

The conclusion of the respondent fails to recognize that the consumer never paid the expense in the first place. The "expense" of taxes was at all times merely hypothetical

because rates are prospective only (*Matter of Niagara Mohawk Power Corp. v. Public Serv. Comm. of State of N.Y.*, *supra*). The rate is comprised of hypothetical expenses based in some instances on past actual expenses. The petitioner in its brief seems to contend that the tax refunds are earnings; however, it is readily apparent that they are not in any sense money earned by the utilization of borrowed or ownership capital in the utility business. The funds are not the result of good management (savings by efficiency) or the result of services rendered to the customers. Since the income has no direct relationship to past investment in the company and does represent an amount expressly intended to be paid dollar for dollar in the rate as an operating expense (see Comment, *Utility Rates, Consumers and the New York State Public Service Commission*, 39 Albany L. Rev. 707, 720) the recovery thereof is not "earnings".

Based upon the foregoing considerations, the overall conclusion of the respondent that the recovery of items considered to be an expense in computing revenues or tariffs constitutes capital contributed by consumers is not lacking a rational basis. While the concept that it is a return of expenses actually paid by consumers is not persuasive, the notion that the money represents items intended by both parties to have been paid dollar for dollar by consumers and not from the ordinary employment of investment funds reasonably flows from the respondent's decisions.

The petitioner does not contest the concept that consumer contributed capital should not be included in the assets forming the rate base and it has not established that the respondent was arbitrary in assigning that classification to the assets at issue herein. The further contention of the petitioner that excluding the assets (income) from the rate base is the equivalent of recouping past overpayments is without any sound basis. The respondent is not now directing any "flow through" of refunds or recouped

past expenses, but is simply excluding them as items upon which the stockholders (company) are entitled to receive a fair rate of return as invested capital.

If it be assumed that the respondent adopted the dictum in this court's prior decision (*Matter of Niagara Mohawk Power Corp. v. Public Serv. Comm. of State of N.Y.*, *supra*, p. 257), there is on the present record no showing that the respondent's determinations were irrational or that there was no sound basis in reason for its determinations.

While the petitioner cites numerous decisions, it is significant that there is no authority which determines that the tax refund here involved must or even should be considered part of the capital investment of the petitioner.

The determinations should be confirmed, and the petitions dismissed, with costs.

ORDER 2724-77

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ALBANY

In the Matter of the Application of
 NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

For a Judgment Pursuant to
 ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES,

against

THE PUBLIC SERVICE COMMISSION OF THE
 STATE OF NEW YORK,
Respondent.

The above named petitioner having applied to this Court by petition verified the 14th day of March, 1977 for a judgment pursuant to Article 78 of the Civil Practice Law and Rules annulling the determinations, opinions and orders of the respondent Public Service Commission issued November 16, 1976 and December 30, 1976 in its Cases numbered 26943 and 26944 and 26945 relating to the disposition of refunds received by petitioner of federal income taxes and real property taxes and for further relief as set forth in the petition, and due notice having been given to the respondent Public Service Commission of the State of New York and said respondent having served and filed its answer to said petition, verified April 4, 1977 and this matter having come on to be heard before this Court,

Now upon reading and filing said petition and answer and it appearing that the petitioner herein has raised questions under subdivisions 4, and other subdivisions of Section 7803 of the Civil Practice Law and Rules, and on

12a

motion of respondent Public Service Commission of the State of New York, it is

ORDERED that the above-entitled proceeding be and the same hereby is transferred for disposition to a term of the Appellate Division held in and for the Third Judicial Department in accordance with Section 7804(g) of the Civil Practice Law and Rules.

ENTER,

/s/ ROBERT C. WILLIAMS

Signed:

Albany, New York

April 11, 1977

13a

County Clerk's Index No.:

2724/1977

**Notice of Appeal to the
Supreme Court of the United States**

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

In the Matter of
NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

for a Judgment under Article 78 of the
Civil Practice Law and Rules

against

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

Notice is hereby given that Niagara Mohawk Power Corporation, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New York, Appellate Division, Third Department entered in this proceeding on September 12, 1977.

This appeal is taken pursuant to Title 28 United States Code, Section 1257, subparagraph (2).

Dated: April 4, 1978

LAUMAN MARTIN, Esq.

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OFFICE OF
ALBANY COUNTY CLERK

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ALBANY, N. Y.

MAY 30 1978

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1460

NIAGARA MOHAWK POWER CORPORATION,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEW YORK—APPELLATE DIVISION—THIRD DEPARTMENT.

MOTION TO DISMISS AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 30, 1978

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1460

NIAGARA MOHAWK POWER CORPORATION,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,

Appellee.

On Appeal From the Supreme Court of the State of
New York—Appellate Division—Third Department

MOTION TO DISMISS AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the grounds that it does not present a substantial federal question, and that the federal question was not timely or properly raised or expressly passed upon. Furthermore, there is no warrant for granting the alternative request for a writ of certiorari.

Statement

On November 16, 1976, appellee, the Public Service Commission of the State of New York (Commission), concluded an investigation of a petition by appellant, Niagara Mohawk Power Corporation (Niagara Mohawk or company), for increased rates. The Commission granted the request in part, but when determining the company's revenue requirement excluded from rate base approximately \$12.5 million received as Federal income tax refunds (Appellee's appendix, p. 1a). The refunds resulted from Niagara Mohawk's retroactive application of guideline lives (a form of accelerated depreciation) which decreased the company's income tax liability for 1966-1968 tax years. The company had not filed for the refunds until 1973 and 1974 and did not receive the refunds until 1975 and 1976. The Commission's rate determination was the first complete rate case after all of the tax refunds had been received by Niagara Mohawk.

The company sought review of the Commission's decision in a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules. The case, which was commenced in Supreme Court, Albany County, was transferred to the Appellate Division, Third Department (Appellant's appendix, pp. 11a-12a), which concluded that the Commission's determination was proper. The Court stated (*Niagara Mohawk Power Corp. v. Public Service Commission*, 59 A.D.2d 73, 75):

... [T]he overall conclusion of the respondent that the recovery of items considered to be an expense in computing revenues or tariffs constitutes capital contributed by consumers is not lacking a rational basis. While the concept that it is a return of expenses actually paid by consumers is not persuasive, the notion that the money represents items intended by both parties to have been paid dollar for dollar by consumers and not from the ordinary employment of investment funds reasonably flows from the respondent's decisions.

Subsequently, the Appellate Division denied Niagara Mohawk's motion for reargument or its alternative request for permission to appeal to the New York Court of Appeals (Appellant's appendix, pp. 2a-3a). After that denial, Niagara Mohawk moved the Court of Appeals for leave to appeal. That motion was also denied (Appellant's appendix, p. 1a).

Appellant's pleadings before both the Appellate Division (Appellee's appendix, pp. 2a-4a) and the Court of Appeals (Appellee's appendix, pp. 5a-7a) show that at no time during its appeal in the proceeding did Niagara Mohawk pursue the question of whether the Commission's orders violated provisions of the Constitution.

Appellant filed a notice of appeal to this Court on April 4, 1978 (Appellant's appendix, pp. 13a-14a).

ARGUMENT

I. There is no substantial federal question.

This appeal is taken pursuant to 28 U.S.C. 1257(2) (Appellant's appendix, p. 14a), which provides for appeals to this Court from state court decisions "... where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution ... and the decision is in favor of its validity." The statute in question is a rate order of the Commission. If an appeal is not granted, appellant asks that its request be acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. 2103 (Jurisdictional Statement, p. 3).

The Court should not entertain this case, however, because it presents no substantial federal question for review. The claims are flimsy, to say the least. In addition, as we discuss in Point II below, appellant did not properly raise its asserted federal constitutional argument in the New York State courts.

The state statute whose constitutionality is being challenged by appellant (Jurisdictional Statement, pp. 6-8) is a rate order of the Commission which determined that approximately \$12.5 million of Niagara Mohawk's rate base did not require a return on investment when the Commission set just and reasonable rates for the company in a decision dated November 16, 1976. The rate base exclusion related to what the Commission found to be (Appellee's appendix, p. 1a) customer-contributed capital in the form of income tax refunds resulting from a recomputation of the company's federal income taxes for the years 1966-1968. Niagara Mohawk had timely paid its income taxes during the years 1966-1968 and its rates were based on the payment of such taxes. After the Commission in 1972 had indicated that New York utilities should use guideline lives—a form of accelerated tax depreciation—(*Consolidated Edison Company of New York, Inc.*, 12 NY PSC 630 (1972)), Niagara Mohawk in 1973 and 1974 requested refunds for prior years. In effect, the company seeks to have the benefit both of rates based on higher taxes and the use of refunds stemming from a post-rate year recomputation of taxes. The company challenges the Commission's rate treatment of the tax refunds as being confiscatory and in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

Contrary to appellant's argument, a utility is not constitutionally entitled even to retain such refunds. Although the Commission, here, did not order a return of the refunds to the company's ratepayers, but rather excluded the refunds from the rate base earning a return, it clearly had the authority to take necessary measures to protect the ratepayers whose past rates had paid for expenses that were later refunded.

While there is no constitutional prohibition to reparations or retroactive ratemaking, neither the New York Public Service Law nor the similar provisions of the Natural Gas Act contemplate such orders. And that is not even involved here. This Court, for example, approved the flow through of refunds resulting from the judicial stay of an FPC rate reduction order as not involving reparations or past ratemaking in *F.P.C. v. Interstate Natural Gas Co.*, 336 U.S. 577 (1949). In that case, the Federal Power Commission had ordered a reduction in wholesale natural gas rates. Both the pipeline companies who were supplied by Interstate and local distribution companies supplied by the pipeline companies claimed entitlement to refunds resulting from a fund established pending judicial review of the FPC's rate reduction order. Even though the fund had been created through payments by the pipeline companies, this Court directed that the refund be paid to the customers of the pipelines.

Other orders of the FPC directing the flow through of refunds have also been upheld by the federal courts. See, *Texas Eastern Transmission Co.*, 39 F.P.C. 630 (1968), affirmed *sub nom Texas Eastern Transmission Co. v. F.P.C.*, 414 F.2d 344, 349 (5th Cir., 1969), certiorari denied, 398 U.S. 928 (1970); *Northern Natural Gas Co. v. F.P.C.*, 215 F.2d 892, 898 (8th Cir., 1954).

Here, although the Commission did not order a refund because it determined that the company's cash flow situation made it desirable for it to retain the money, it found that the customers should not be required to pay a return on the refunds retained. Niagara Mohawk had paid taxes and based its rates in the earlier years upon its understanding and interpretation of applicable laws existing at the time the returns were filed. The nature of the income tax process is such, that in some cases, adjustments either for excesses or deficiencies may take years to determine. The Commission, of course, in the meantime allows the company to recover its tax expense in

rates it approves. If the company overpays its taxes the rates approved will have allowed the company to recover an expense which is later refunded. At that time, the Commission must take action to protect the ratepayers from bearing the burden of the overpayment. If, on the other hand, the company is charged with a deficiency in past payments, the Commission will permit a company to recover tax deficiencies later assessed in a current rate case.

This case is totally unlike *Board of Pub. Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926), cited by appellant (Jurisdictional Statement, pp. 7-8), where the New Jersey Commission sought to offset a rate increase by applying a past excess in the company's depreciation reserve to future increased expenses. Here the Commission has not sought to use a past excess in earnings to reduce future rates, but has, rather, denied the company's request for a return on money it received as a rebate of expenses previously paid. There can be no confiscation in this case because Niagara Mohawk had been allowed the full expense for taxes it incurred and it will therefore not be deprived of an opportunity to earn a reasonable rate of return (*F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)). There is plainly no obligation to permit a utility two chances to earn the same expenses.

As in *Interstate, supra*, no claim has been made that Niagara Mohawk's rates were so low during the period 1966-1968 that it is entitled as a matter of law to the refunds. To the contrary, the company's rates were set not taking into account the availability of guideline lives to reduce income taxes, so the company was actually provided with more money than was required to earn a reasonable rate of return.

Niagara Mohawk also argues (Jurisdictional Statement, pp. 8-9) that its right to due process of law was violated because the Appellate Division of the Supreme Court confirmed the Commission's order on the basis of a rationale not used by the

Commission. This contention is not correct and, in any event, does not raise any constitutional issues.

After reviewing the Commission's order, the Appellate Division stated (59 A.D.2d at 75):

Based upon the foregoing considerations, the overall conclusion of the respondent that the recovery of items considered to be an expense in computing revenues or tariffs constitutes capital contributed by consumers is not lacking a rational basis....

The Commission's conclusion that the tax refunds constituted consumer contributed capital was the basis of the Commission's determination to exclude these sums from rate base (Appellee's appendix, p. 1a). The result of the Commission's opinion was to treat Niagara Mohawk's tax refunds as it would have treated any other customer contributed capital and that is precisely the result which the Appellate Division accepted and which the company challenges in this proceeding. Moreover, the Commission's rationale, like that of the Appellate Division, was based on the fact that Niagara Mohawk's rates in 1966-1968 had assumed an obligation to pay taxes without regard to guideline lives. Once refunds were received because of a recomputation of taxes based on guideline life use, that assumption turned out to be invalid.

The Appellate Division properly exercised its responsibility under New York Law. The Appellate Division's decision is in keeping with its responsibilities under New York Law, Civil Practice Law and Rules, § 7803, which provides that the court in reviewing a Commission decision should assess "...whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion..." Moreover, appellant was not even able to convince the New York Court of Appeals that the Appellate Division's decision merited review by that Court. In any event, the responsibility of reviewing

courts in New York State is not a matter that raises federal Constitutional issues permitting appeal to this Court or warranting consideration on certiorari.

S.E.C. v. Chenery Corp., 332 U.S. 194 (1947), cited by appellant (Jurisdictional Statement pp. 9-10), would not, contrary to appellant's contention, raise issues of a constitutional nature, even if it were factually in point. *Chenery* essentially held that a federal administrative agency must be correct for the right reasons, otherwise a remand is required. While we believe that situation obtained in the affirmance of the Commission's action in the State courts, *Chenery* is concerned with the proper scope of a federal court reviewing federal agency decisions, and as the quote cited by appellant shows (Jurisdictional Statement, p. 9), was based on construing Congressional intent in defining the scope of review. It formulates a doctrine of judicial restraint setting forth the limits of a court's responsibilities when reviewing an agency's decision. On the other hand, as this Court's decision in an earlier *Chenery* case, *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943), makes clear, the authority of a federal appellate court would permit sustaining a lower court decision on different grounds. Appellant's attempt (Jurisdictional Statement, p. 9) to link the *Chenery* doctrine with due process considerations, by arguing that procedural due process requires the opportunity to challenge the evidence and the theory that purportedly supports an agency's determination, totally ignores that long standing practice. While the role of a federal reviewing court differs depending on whether a case comes from an agency or lower court, due process considerations are not involved. Even assuming, *arguendo*, the New York State courts did not construe their review function in the same way, there is no reason why they would be precluded, as a constitutional matter, from modifying an administrative decision.

II. The alleged federal question raised by the appellant in its jurisdictional statement may not be raised for the first time in this Court.

This Court will not exercise jurisdiction to consider federal questions presented for the first time in a jurisdictional statement pursuant to 28 U.S.C. 1257(2), *Cardinale v. Louisiana*, 394 U.S. 437 (1959); *Safeway Stores, Inc. v. Oklahoma Retail Grocers*, 360 U.S. 334 at 342 n.7 (1969); *Herdon v. Georgia*, 295 U.S. 441 (1935); and *Crowell v. Randell*, 10 Pet. 368 (1836). This rule or practice provides sufficient basis for dismissing appellant's claim (whether treated as an appeal, or a petition for certiorari pursuant to 28 U.S.C. 2103). In its pleadings before the New York State courts in this case, appellant has failed in its obligation to "...specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them...; and the way in which they were passed upon by the court..." Supreme Court Rules 15(1)(d) and 23(1)(f).

Neither Niagara Mohawk's petition to the Appellate Division of the New York Supreme Court, Third Department, (Appellee's appendix, pp. 2a-4a) nor its Motion for Leave to Appeal to the New York Court of Appeals (Appellee's appendix, pp. 5a-7a), includes any reference to the United States Constitution. In short, the federal question asserted here was never "raised, preserved, or passed upon in the state courts below", *Cardinale v. Louisiana, supra*, at 438-439.

The burden of establishing that a federal question was raised properly in the state courts rests clearly on appellant. *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 651 (1942) and *Street v. New York*, 394 U.S. 576 (1969). Appellant has failed to meet that burden by simply asserting (Jurisdictional Statement, pp. 2-3) that the validity of the challenged rate orders "...was drawn into question in the Appellate Division

on the ground of their being repugnant to the Constitution of the United States....” In fact, the petition (Appellee’s appendix, pp. 2a-4a) nowhere mentions the Fifth Amendment, the Fourteenth Amendment or even the Constitution. Paragraph 7 of the petition, which sets forth the grounds for appellate review of administrative orders pursuant to Article 78 of the New York Civil Practice Law and Rules, includes the word “confiscatory”; however, the mere insertion of that word in a paragraph summarizing the grounds for judicial review does not sufficiently raise and preserve the constitutional question. Moreover, a reading of the briefs and the Appellate Division order affirming the respondent’s rate order discloses that at no time was a federal question raised, argued, or decided.

The thrust of appellant’s arguments in the state court’s concerned the authority of the Commission under the New York Public Service Law. That statute contains a provision (Section 66 (18)) empowering the Commission to order refunds to appellant’s customers when the FPC reduces wholesale gas or electric rates. Appellant has never questioned the constitutionality of the statute, but did argue, when the Commission ordered a flow through to the ratepayers of income tax refunds, that the specific delegation of power in Section 66 (18) of Public Service Law showed that the Commission lacked statutory authority to order the flow through of other refunds. See, *Niagara Mohawk Power Corp. v. Public Service Commission*, 54 A.D.2d 255 (1976).

Even more damaging to the appellant’s position is the substance of its notice of motion for leave to appeal to the Court of Appeals and the papers filed in support thereof (Appellee’s appendix, pp. 5a-7a). Nowhere in those papers did appellant raise any federal question. In those papers, appellant urged simply that the Court of Appeals decide several rate-making issues on state law grounds which the court declined to do. By raising a federal question for the first time in its jurisdictional statement, appellant would, in effect, deprive the New York Court of Appeals of the opportunity to pass on the federal question in the first instance—an opportunity which this Court has always insisted be given as a prerequisite to exercising its jurisdiction whether by certiorari or appeal. See, e.g., *Hill v. California*, 401 U.S. 797, 805 (1971), where the Court asserted that there is “...the desirability of allowing state courts to pass first on the constitutionality of state statutes in light of a federal constitutional challenge; this assures both an adequate record and that the States have first opportunity to provide a definitive interpretation of their statutes...”, citing *Cardinale, supra*, see also, *Crowell v. Randall, supra*.*

In addition to appellant’s failure to raise a substantial federal constitutional question for review by this Court, its failure to raise the issue below precludes its attempt to raise the issue *de novo* at this time.

. . .

* Appellant’s failure to raise a federal constitutional question below is further demonstrated by its decision to move for leave to appeal to the Court of Appeals pursuant to New York CPLR § 5602 rather than attempt to take an appeal as of right as provided by CPLR § 5601(b) where “...there is directly involved the construction of the constitution of the state or the United States...”.

While not showing a right to appeal, appellant's Jurisdictional Statement shows no reason why this Court should grant a writ of certiorari. There are clearly no federal questions presented that warrant review by this Court.

Conclusion

For the above reasons, appellant's appeal should be dismissed and this Court should not grant a writ of certiorari to review the decision below.

Respectfully submitted,

PETER H. SCHIFF
General Counsel
HOWARD J. READ
Attorney
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of the State of New York
Empire State Plaza
Albany, New York 12223

Attorneys for Appellee
Public Service Commission
of the State of New York

May , 1978

APPENDIX

**Commission Opinion Denying Niagara Mohawk A
Return On Tax Refunds**

* * *

Tax Refunds

In September 1975 the Commission ordered NMP to flow through to its ratepayers tax refunds it received from the retroactive application of minimum guideline lives for computing tax depreciation. The amount to be passed on is approximately \$12.4 million. NMP contested the Commission's order and prevailed in the Supreme Court.

On November 10, 1976, the Appellate Division issued its opinion (*Niagara Mohawk Power Corp. v. PSC*, Case 29296). While this court also held that the Commission erred in ordering refunds between cases, it specifically stated that this conclusion was not unfair because the Commission may consider "this acquired money when a future rate adjustment is requested." While we do not agree with the court's decision that our original remedy was incorrect, the fact that a rate case is now underway provides an immediate vehicle for considering the proper treatment of these refunds.¹

The Appellate Division's decision does not appear to prohibit any particular method of dealing with this money. The company's cash flow considerations, however, to which we refer throughout this Opinion, argue persuasively against ordering the company to pay out these sums at this time. But this money was originally paid by customers for an expense that the company ultimately did not incur. Accordingly, we will require the amounts to be treated as customer-contributed capital with a zero cost. The treatment will give consumers the full benefit of the refunds.²

¹ Since the timing of the court's decision enables us to deal fully with the funds in question now, the issue in court is moot insofar as that case is concerned.

² We reserve the right, however, to provide for a different distribution of these funds in our next rate case if circumstances at that time would indicate the desirability of such a change.

Petition**SUPREME COURT OF THE STATE
OF NEW YORK**

County of Albany

 In the Matter of the Application of
 NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

For a Judgment Pursuant to Article 78
 of the Civil Practice Law and Rules,

against

THE PUBLIC SERVICE COMMISSION OF
 THE STATE OF NEW YORK,
Respondent.

 Index No.

To the Supreme Court of the State of New York:

The petition of Niagara Mohawk Power Corporation ("Niagara Mohawk" or the "Company") respectfully shows:

1. Petitioner, Niagara Mohawk Power Corporation, is a privately owned public utility corporation serving customers in 37 counties of the State of New York with gas and electricity or with electricity only; Niagara Mohawk is duly incorporated under the laws of the State of New York with its principal office located at 300 Erie Boulevard West, Syracuse, New York 13202; Niagara Mohawk is subject to the jurisdiction of the Public Service Commission of the State of New York (the "Commission") pursuant to the Public Service Law.

Appendix—Petition.

2. On December 19, 1975, Niagara Mohawk initiated rate proceedings (Cases 26943, 26944, 26945) before the Commission which, after numerous days of hearings throughout 1976 and briefing in mid-1976, culminated in a Commission Opinion and Order dated November 16, 1976, allowing the Company to increase its electric rates by \$52,890,000 and its gas rates by \$10,798,000 (Opinion and Order annexed hereto as Exhibit A).

3. In that Opinion and Order, the Commission required the Company to treat as customer-contributed capital with a zero cost, approximately \$12.4 million of income tax refunds which the Company received in 1974 and 1975 due to the retroactive adoption of minimum guideline lives for computing tax depreciation in the years 1966-1968 (Exhibit A, pp. 13-14).

4. By Order dated December 30, 1976 (Case 26943) the Commission directed the Company to treat \$836,441 of real property tax refunds for the years 1971-1974 in the same manner as the income tax refunds (Order annexed hereto as Exhibit B).

5. By Order issued February 10, 1977, the Commission denied a petition for rehearing filed by the Consumer Protection Board (concerning, in part, the tax refund issue) and adhered to its decision on the treatment of the tax refunds as set forth in its Opinion and Order dated November 16, 1976 (Order annexed hereto as Exhibit C).

6. The combined effect of the Commission's treatment of the income tax refunds and real property tax refunds is to reduce the Company's rate base by more than \$13 million and its annual revenue requirements by approximately \$2.5 million.

Appendix—Petition.

7. The Commission Orders of November 16 and December 30, 1976 are arbitrary, unsupported by substantial evidence, confiscatory, and contrary to the legal principle that future rates may not be determined on the basis of alleged past excesses.

8. No previous application for the relief herein requested has been made to any court.

WHEREFORE, for the reasons set forth herein, the petitioner prays that the Court issue a judgment pursuant to Article 78 of the CPLR annulling the Commission's order of November 16, 1976 (Cases 26943, 26944, 26945) in the respect complained of and the order of December 30, 1976 (Case 26943) in its entirety and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York,
March 14, 1977.

LeBOEUF, LAMB, LEIBY
& MacRAE

140 Broadway
New York, New York 10005
(212) 269-1100

JOHN H. TERRY

Senior Vice President, General
Counsel and Secretary

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(315) 474-1511

Affidavit of Halcyon G. Skinner

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of
NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules
against

THE PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,
Respondent.

State of New York }
County of New York } ss.:

HALCYON G. SKINNER, being duly sworn deposes and says that:

1. I am a member of the firm of LeBoeuf, Lamb, Leiby & MacRae, attorneys for Niagara Mohawk Power Corporation ("Niagara Mohawk"), the movant herein, and submit this affidavit in support of the foregoing motion for leave to appeal to the Court of Appeals pursuant to § 5602 of the Civil Practice Law and Rules.

2. Niagara Mohawk is challenging New York Public Service Commission ("Commission") determinations made in the Company's last rate proceeding which treated \$13.24 million of Federal income tax refunds and real property tax refunds received by the Company (and relating to prior years) as

Appendix—Affidavit of Halcyon G. Skinner.

customer-contributed capital, thereby excluding them from rate base and preventing the Company from earning a return thereon.

3. The unanimous confirmation of the Commission's determinations by the Appellate Division, Third Department on August 4, 1977 (annexed as Exhibit A) has precluded Niagara Mohawk from appealing as of right under CPLR 5601(a). Notice of Entry together with a copy of the Judgment of the Appellate Division dismissing the Petition (annexed as Exhibit B) was served by mail upon Niagara Mohawk on September 13, 1977.

4. A motion for reargument or, in the alternative, for leave to appeal to the Court of Appeals was made by Niagara Mohawk on September 1, 1977 before and denied by the Third Department on October 14, 1977. Notice of Entry together with a copy of the Order of Denial (annexed as Exhibit C) was served by mail upon Niagara Mohawk on October 31, 1977.

5. The determinations of the Commission and the confirmation by the Third Department were contrary to law in the following respects:

(a) The determination that tax refunds received by the Company were customer-contributed capital was contrary to established precedent and unsupported by any evidence;

(b) The Third Department substituted its own rationale for that of the Commission after rejecting the sole rationale advanced by the Commission in support of its determinations;

(c) The determinations violated the well-established rule against retroactive ratemaking; and

Appendix—Affidavit of Halcyon G. Skinner.

(d) The determinations were made without the benefit of any evidence on the actual returns earned by the Company during the periods to which the refunds pertain.

6. To the best of my knowledge and belief, the questions raised based on the facts herein had not been passed upon by any court in this state prior to the determination of the Appellate Division, Third Department and have never before been passed upon by this Court. They are questions of substantial public importance that are likely to recur in the future.

7. The argument set forth herein are fully considered in the accompanying memorandum which I hereby request be incorporated by reference.

WHEREFORE, your deponent respectfully requests that this Court grant Niagara Mohawk's motion for leave to appeal.

HALCYON G. SKINNER.

Sworn to before me this 22nd day of November, 1977.

STUART LEBANSKY

Notary Public

State of New York

No. 4633871

Commission Expires March 30, 1978

JUN 2 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1460

NIAGARA MOHAWK POWER CORPORATION,
Appellant,

v.

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STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEW YORK-APPELLATE DIVISION-THIRD DEPARTMENT

BRIEF OPPOSING MOTION TO DISMISS

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1460

NIAGARA MOHAWK POWER CORPORATION,
Appellant,
v.

THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEW YORK-APPELLATE DIVISION-THIRD DEPARTMENT

BRIEF OPPOSING MOTION TO DISMISS

Niagara Mohawk Power Corporation ("Niagara Mohawk", "Appellant" or "the Company") hereby opposes the Motion to Dismiss and Brief in Opposition to Petition For A Writ of Certiorari ("Motion") filed by the Public Service Commission of the State of New York ("the Commission" or "Appellee") in response to Niagara Mohawk's Jurisdictional Statement.

Introduction

The Commission's Motion is based on two erroneous arguments: first, that no substantial federal question has been raised, and second, that the federal questions raised in Niagara Mohawk's Jurisdictional Statement were not properly raised in the courts below. Before responding to the Commission's specific jurisdictional challenges it must

be emphasized that the Motion contains several allegations or statements that are not part of the record in the case and could be misleading.

First, the Commission argues that there "can be no confiscation in this case because Niagara Mohawk had been allowed the full expense for taxes it incurred".¹ The repeated statement that the Company's rates were based on the payment of taxes actually made in the years 1966-1968 is incorrect. There is no evidence of record whatsoever concerning whether any use was made of the Company's actual tax payments for the years 1966-1968 in setting rates of the Company. Therefore, the Commission's original rationale in deciding this case, i.e., that "this money [the tax refunds] was originally paid by customers for an expense that the Company ultimately did not incur" and the Appellate Division's statement that "the money [tax refunds] represents items intended by both parties to have been paid dollar for dollar by consumers"² have absolutely no foundation in the record.

Second, the Commission implies that the Company has earned more than a reasonable return as a result of the tax refunds and that its customers have been overcharged. For example, the Commission states that it seeks "to protect the ratepayers from bearing the burden of the overpayment" and that inclusion of the refunds in rate base would provide the Company "with more money than was required to earn a reasonable rate of return."³ Once again, there is no evidence of record to support these conclusory allegations that the Company's customers have been subjected to overpayments or that the Company, by being permitted to earn a return on the tax refunds, has or will earn more than

1. Motion at page 6.

2. See Appellant's Jurisdictional Statement at p. 9a.

3. Motion at page 6.

a reasonable rate of return. The fact is that the Company has not achieved the return allowed by the Commission during any one of the past ten years.

The Substantial Federal Questions Were Properly and Timely Raised in the Courts Below

This action was commenced by the filing of a petition in the Supreme Court of the State of New York, Albany County, on March 14, 1977. The petition specifically alleged that the Commission's orders were "arbitrary, unsupported by substantial evidence, confiscatory, and contrary to the legal principle that future rates may not be determined on the basis of alleged past excesses." The basis of the Company's challenge was expanded upon in the memorandum of law submitted simultaneously with the petition. In its memorandum the Company expressly raised the constitutional question as follows: "Was the Commission's action . . . confiscatory under the federal and New York State Constitutions?"⁴ Upon transfer of the action from the Supreme Court, Albany County, to the Appellate Division, the Company submitted a brief which raised the constitutional question in the identical manner as it was raised in the Company's memorandum submitted to the Supreme Court, Albany County.⁵

The Company's phrasing of the issue, "Was the Commission's action . . . confiscatory under the federal and New York State Constitutions" clearly meets the standard of particularity with which a federal question must be raised in order to sustain this Court's jurisdiction as set forth in *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928):

There are various ways in which the validity of a state statute may be drawn in question on the ground

4. Memorandum of Law for Appellant at page 2.

5. Brief for Appellant at page 2.

that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

See also *Street v. New York*, 394 U.S. 576, 584 (1969). The clear intendment standard enunciated in *New York ex rel. Bryant v. Zimmerman*, *supra*, formed the basis for this Court's decision in *Braniff Airways, Inc. v. Nebraska State Board of Equalization*, 347 U.S. 590 (1954), where the appellant had erroneously invoked the Commerce Clause of the U.S. Constitution instead of the Due Process Clause of the Fourteenth Amendment. Despite naming the wrong constitutional clause in support of its position, the appellant's case received plenary consideration. This Court held:

However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented. *Id.* at 598-599.

The Company's explicit use of the term "confiscatory under the federal . . . Constitution" clearly served to raise the constitutional issue now before this Court.

The Commission further contends that the federal questions involved are not substantial. In support of this assertion the Commission cites several cases where refunds to customers were allowed under the Natural Gas Act, 15 U.S.C. § 717. These cases are inapposite: they concerned a

different agency, a different statute, completely different circumstances and did not involve the constitutional issue of confiscatory ratemaking presented in the instant case. In the instant case there is no question as to whether a refund to consumers is appropriate or permissible; the Appellate Division has already considered and rejected the Commission's attempt to order the flow through to customers of the same tax refunds at issue here. *Niagara Mohawk Power Corp. v. Public Service Commission*, 54 App. Div.2d 255, 388 N.Y.S.2d 157 (3rd. Dept. 1976). The issue presently raised by the Company is one of confiscation; whether the Commission can isolate a single item of the Company's property and deny the Company *any* return on such property.

In addition to citing these various FPC cases the Commission attempts to distinguish *Board of Pub. Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926), on the ground that the Commission, unlike the Board in that case, is here not attempting to use a past excess in earnings to reduce future rates. The fallacy of this distinction is obvious. If the Commission is not contending that the Company collected too much from customers in the past because an excess tax allowance had allegedly been used in setting the Company's rates, it must be concluded that the Commission's isolation of tax refunds for special treatment had no rational basis and was arbitrary. The fact that the Commission appears to distinguish between excess earnings and a single expense that was excessive highlights the broad conceptual difficulty underlying the Commission's approach. In short, the Commission is conceding that a utility may not be penalized in fixing rates for the future because its prior rates produced excessive earnings, *Board of Pub. Utility Commissioners, v. N.Y. Tel. Co.*, *supra*, but, on the other hand, the Commission contends that a utility

may have its future rates reduced (by reduction in rate base here) if a single expense allegedly used in setting prior rates is ultimately viewed to have been too high. The suggestion that a single past expense allowance may be characterized as excessive and treated in isolation as the basis for a reduction in future rates, while earnings representing the net of all expenses and revenues may not, runs directly counter to the basic principles of ratemaking.

The Commission also argues that the principle enunciated in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), is neither applicable to state courts nor grounded in due process considerations. The *Chenery* rule has been expressly accepted by the New York State Court of Appeals. *Matter of Seitelman v. Lavine*, 36 N.Y. 2d 165, 170 (1975); *Matter of Barry v. O'Connell*, 303 N.Y. 46, 51 (1951). The judicial responsibility for effective and timely review of administrative abuse requires an agency to "disclose the basis of its order," *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941), and further requires that the order "cannot be upheld unless the grounds upon which the agency acted . . . were those upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943); See also *FPC v. United Gas Pipeline Co.*, 393 U.S. 71, 72 (1968). That the agency must state the reasons for its determination and that the judiciary must sustain the determination, if at all, solely on that basis is inherent in and inextricably intertwined with the procedural due process guarantees of the Fourteenth Amendment. See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962); *Northern Pacific RR Co. v. Dept. of Public Works*, 268 U.S. 39, 44-45 (1925); *Cf. Saunders v. Shaw*, 244 U.S. 317 (1917).

Conclusion

For the reasons stated above and in its Jurisdictional Statement the Appellant requests that the Court give this matter plenary consideration.

Respectfully submitted,

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